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No. 10-

IN THE

# Supreme Court of the United States

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC.,

*Petitioner*,

v.

SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA,

*Respondent*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner, a non-Indian corporation, entered into a contract with the Sac and Fox Tribe of the Mississippi in Iowa to provide casino-related investigative and security services after tribal dissidents, in violation of federal and tribal law, seized control of the Tribe's casino. The contract requires arbitration of all disputes arising out of it. For the Tribe, the contract was negotiated and signed by the Walker Council, which was then the Tribe's federally recognized governing body. The Bureau of Indian Affairs had repeatedly refused to recognize the dissidents instead of the Walker Council, and the National Indian Gaming Commission had ordered the casino be closed until the Walker Council regained control of it. Nevertheless, after the dissidents won a tribal election and obtained federal recognition, the Tribe sued petitioner in tribal court, contending that its contract was unauthorized and that petitioner's alleged conduct under the contract was tortious under tribal law.

The questions presented are:

(1) Do the federal agencies' orders establish that the Walker Council had authority to control the casino and enter the contract, such that the Tribe's claims must be arbitrated, not litigated in tribal court?

(2) Does the tribal court lack jurisdiction over the Tribe's claims that petitioner committed tribal-law torts by entering into the casino, investigating the dissidents' illegal operation of the casino, and receiving payments from the Walker Council?

## PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

## RULE 29.6 DISCLOSURE STATEMENT

Petitioner Attorney's Process and Investigation Services, Inc., has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

This case involves an effort by an Indian tribe to use a tribal-court lawsuit against a nonmember as a collateral attack on federal administrative orders the tribe no longer likes. As a matter of federal law, those orders, issued by the Bureau of Indian Affairs (BIA) and the National Indian Gaming Commission (NIGC), establish that the tribal council led by Alex Walker, Jr., (the Walker Council) was the only tribal council in 2003 with authority to operate the federally regulated casino of the Sac and Fox Tribe of the Mississippi in Iowa. The Tribe did not appeal those orders except for one, which was upheld. Yet years later, the Tribe claims that (a) its tribal court can hold that another, *unrecognized* tribal council was actually the only council with authority over the casino; (b) its tribal court can adjudicate tort claims that would impose severe liability on a nonmember (Attorney's Process and Investigation Services, Inc., (API)) who, in accordance with the federal orders, contracted with the Walker Council to help it operate the casino; and (c) federal courts are powerless to vindicate the federal orders.

The supremacy of federal law requires that the Tribe's claims be rejected and that its tribal-court suit not be allowed to proceed. Federal law protects nonmembers from being subjected to tribal law in tribal courts. This Court has never allowed such a suit to proceed, yet has held that one might proceed if a tribe has regulatory jurisdiction over a nonmember, which exists in only two narrow circumstances (called the *Montana* exceptions after the decision that elaborated them). See *Plains Commerce Bk.* v. *Long*, 128 S. Ct. 2709, 2720 (2008); *Montana* v.

*United States*, 450 U.S. 544 (1981). Here, the Eighth Circuit Court of Appeals found that the Tribe's claims satisfied the rare second *Montana* exception, which permits a tribe to regulate conduct that "imperils the subsistence or welfare of the tribe," *i.e.*, conduct "catastrophic" for "the political integrity, the economic security, or the health or welfare of the tribe." *Plains Commerce*, 128 S. Ct. at 2726–2727.

In allowing the Tribe's suit to proceed, the Eighth Circuit answered two important questions of federal law in conflict with decisions of this Court and other courts, departed from elementary principles of administrative law and Indian jurisdiction, and, as a result, expanded tribal jurisdiction over nonmembers in a way that threatens federal Indian programs. *First*, the BIA and NIGC orders establish as a matter of federal law that, in 2003, the Walker Council alone had authority to control the casino and bind the Tribe to the contract with API. The Eighth Circuit erred in allowing the Tribe and tribal court to vitiate the contract and collaterally attack the federal orders by retroactively assigning a dissident council sole authority over the casino. *Second*, the federal orders conclusively establish that API did not threaten the Tribe with political and economic catastrophe in attempting to help the Walker Council fulfill the orders. API's alleged conduct was no more politically catastrophic than the orders recognizing the Walker Council (instead of the dissidents) and no more economically catastrophic than the orders closing the casino (until the Walker Council regained control from the dissidents). The Eighth Circuit erred in holding that the tribal court nonetheless may exercise jurisdiction over API under the second *Montana* exception.

This Court's review is warranted to right those serious errors, contain their adverse impact, and resolve the conflicts created by the Eighth Circuit's decision.

## OPINIONS BELOW

The Eighth Circuit's opinion (App., *infra*, 1a–34a) is reported at 609 F.3d 927. The opinion of the United States District Court for the Northern District of Iowa (App., *infra*, 35a–62a) is unreported. An earlier opinion of the District Court is reported at 401 F. Supp. 2d 952. The opinion of tribal court of appeals (App., *infra*, 63a–98a) is unreported. The orders of the BIA (*id.* at 142a–148a) and the NIGC (*id.* at 99a–141a) are unreported.

## JURISDICTION

The Eighth Circuit issued its decision on July 7, 2010. App., *infra*, 1a. On September 24, 2010, Justice Alito extended the time to file a petition for a writ of certiorari until November 4, 2010. The Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

25 U.S.C. § 2 provides that the Commissioner of Indian Affairs:

> shall * * * have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 2706(b) provides that the National Indian Gaming Commission:

> (1) shall monitor class II gaming conducted on Indian lands * * *; (2) shall inspect and examine all premises located on Indian

lands on which class II gaming is conducted; * * * (4) may demand access to and inspect * * * all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter; * * * [and] (7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes.

25 U.S.C. § 2713 provides in pertinent part:

(b)(1) The Chairman [of the Commission] shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(b)(2) * * * [T]he Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. * * *

(c) A decision of the Commission * * * to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5.

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

1. The Sac and Fox Tribe of the Mississippi in Iowa is a federally recognized Indian tribe that operates the Meskwaki Bingo Casino Hotel on the Tribe's trust lands in Tama, Iowa. App., *infra*, 2a.

According to its tribal constitution, approved by the Secretary of the Interior in 1937, the Tribe is to be governed by an elected council. In 2002 and 2003, the tribal constitution vested broad authority, including dispute-resolution power, in the elected council and did not establish a tribal court. *In re: Meskwaki Casino Litig.*, 340 F.3d 749, 751 (CA8 2003).

In 2002, the duly elected and federally recognized tribal council was chaired by Alex Walker, Jr. (the Walker Council). In the autumn of 2002, a dissident faction of the Tribe submitted recall petitions to the Walker Council. Exercising its dispute-resolution power, the Walker Council refused to call a special election, as the tribal constitution otherwise provided, because of defects in the petitions. *Ibid.*

On March 2, 2003, the dissidents pursued a self-help remedy not provided by the tribal constitution: the Tribe's hereditary chief appointed Homer Bear, Jr., and other dissidents to a new tribal council (the Bear Council). The Bear Council claimed authority, above and beyond that of the Walker Council, to govern the Tribe under traditional tribal powers that predate the tribal constitution.[1] The Bear Council

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[1] In April 2003, the Tribe sued the Bear Council in federal court, seeking a declaration of which council was authorized to

(footnote continued on next page)

unilaterally hosted and won a special election on May 22, 2003. *Ibid.*

By letter dated March 13, 2003, the Bear Council asked the BIA to recognize it as the Tribe's governing council. The Midwest Regional Director refused. On April 1, the Acting Assistant Secretary—Indian Affairs affirmed that the federal government continued to recognize the Walker Council, not the Bear Council, as head of the Tribe. The Walker Council's federal recognition was reaffirmed by the Deputy Commissioner of Indian Affairs and the Assistant Secretary—Indian Affairs in May and by the BIA in August. See App., *infra*, 142a–148a; see also *id.* at 70a, 113a–114a. The BIA stopped recognizing the Walker Council only after the Bear Council won a special election in November 2003. *Sac & Fox Tribe of the Miss. in Iowa, Election Bd.* v. *BIA*, 439 F.3d 832, 834 (CA8 2006).

2. In the middle of its effort to supplant the Walker Council, the Bear Council physically took control of the Tribe's casino away from the Walker Council on March 26, 2003. *In re: Meskwaki Casino Litig.*, 340 F.3d at 751–752. The Bear Council appointed a new Casino General Manager and Tribal Gaming Commission Chairperson. App., *infra*, 113a.

A month later, the NIGC issued a Notice of Violation, finding that the casino was being operated in violation of the Indian Gaming Regulatory Act (IGRA) and NIGC and tribal regulations. *Id.* at 99a–103a. According to the Notice of Violation, the Bear

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govern the Tribe. The suit was dismissed. See *Sac & Fox Tribe of the Miss. in Iowa* v. *Bear*, 258 F. Supp. 2d 938 (N.D. Iowa 2003), *aff'd*, 340 F.3d 749 (CA8 2003).

Council's occupation and control of the casino violated federal and tribal gaming laws because it (a) deprived the federally recognized tribal government (*i.e.*, the Walker Council) of sole proprietary interest in, and responsibility for, the casino; (b) denied authorized tribal officials access to the casino; and (c) presented a threat to public safety. *Ibid.* After the Notice of Violation, the NIGC issued a Temporary Closure Order, *id.* at 104a -109a, with which the Bear Council refused to comply. U.S. Marshals physically closed the casino on May 23, 2003. *Id.* at 115a. Although gaming at the casino then ceased, the Bear Council and other dissidents continued to occupy the premises. *Id.* at 4a–5a.

The Tribe did not contest the NIGC's findings of violations but appealed only the remedial portion of the closure order. (Despite having the option, the Bear Council did not formally participate in the appeal, but instead engaged in improper *ex parte* communications with the Presiding Official. *Id.* at 120a–123a.) In a Permanent Closure Order issued on September 10, 2003, the NIGC affirmed, holding that "closure * * * is the only practical remedy when an unrecognized faction has illegally taken over the tribal government and its gaming operation." The NIGC further declared that "[g]aming may resume * * * if the Commission is convinced, following a visit by a designated NIGC employee(s), that the Tribe, acting through a duly elected, federally recognized Tribal Council, is in control of the Tribe and Casino, and that no violations of the IGRA, NIGC or the Tribe's Gaming Ordinance exist." *Id.* at 140a–141a.

3. API is a Wisconsin corporation that provides investigative and security services to casino operators and Indian tribes, among others.

On June 16, 2003, about three weeks after the U.S. Marshals closed the casino, Alex Walker, Jr., acting on behalf of the Walker Council and the Tribe, retained API to perform investigative services related to the effort to reopen the casino in accordance with the NIGC orders. The June 2003 Agreement between API and the Tribe committed API to investigate the "individuals involved in the unlawful acts against the Tribal Government"; to develop "a security plan for the re-opening of the Tribe's Gaming Facility"; and to investigate "allegations of unlawful acts and tribal policy violations of the dissident group involving Tribal funds and gaming operations." *Id.* at 160a. The parties also agreed that all disputes "that may arise out of this Agreement" shall be arbitrated and that any arbitral award could be entered by either the District Court for the Northern District of Iowa under the Federal Arbitration Act or the Iowa state courts under Iowa law. *Id.* at 165a–166a.

The Tribe alleges that, from June through September 2003, the Walker Council paid API about $1 million for services rendered under the June 2003 Agreement. The Tribe further alleges that, on October 1, 2003, about three weeks after the NIGC issued the Permanent Closure Order declaring that the casino could reopen only after the federally recognized tribal council had control, API and its agents (some armed with batons and one armed with a firearm) entered the casino, which was still occupied by the Bear Council and other dissidents. Inside, API allegedly assaulted occupants, took and reviewed tribal property (specifically, gaming and business information), and caused about $7,000 worth of property damage. *Id.* at 150a–154a. The Tribe's allegations about API's conduct are still merely allega-

tions: no factfinder has considered their truth yet, and API expects to disprove them.

In December 2003, after the Bear Council won the November 2003 special election and obtained federal recognition, the NIGC reopened the casino. *Id.* at 5a.

## II. THE PROCEEDINGS BELOW

1. In 2004, the Tribe established a tribal court comprising a trial court and a court of appeals. *Id.* at 6a. In August 2005, the Tribe filed a civil suit against API in the tribal court, claiming that API had committed torts under tribal law and owed compensatory and punitive damages. The Tribe's tort claims all presume that the Bear Council, not the Walker Council, had lawful operational control of the casino after May 2003. In particular, the Tribe's complaint claims that, on October 1, 2003, API (a) committed trespass by entering the casino and (b) committed trespass to chattels and misappropriated trade secrets by taking and reviewing casino business information. The Tribe's complaint also claims that, before October 1, 2003, API (c) converted tribal funds by accepting payment from the Walker Council. *Id.* at 155a–156a. The Tribe's complaint does not allege that API attempted to overthrow the Bear Council or otherwise interfere with tribal politics. By the complaint's admission, the Tribe brought its suit "to cause Defendant to return funds to the Tribe which Defendant unlawfully has taken and retained, and because Defendant committed torts against the Tribe and harm to tribal real property and to other tribal property on the Settlement." *Id.* at 149a.

In September 2005, API filed a motion to dismiss, arguing that the tribal court has no jurisdiction over API because it is not a member of the Tribe. API also requested that the Tribe submit to arbitration under the June 2003 Agreement. *Attorney's Process & Investigation Servs., Inc.* v. *Sac & Fox Tribe of the Miss. in Iowa*, 401 F. Supp. 2d 952, 955 (N.D. Iowa 2005) ("*API I*").

2. In October 2005, API filed a complaint against the Tribe in the District Court for the Northern District of Iowa. API's complaint claims that the Tribe breached the June 2003 Agreement by refusing arbitration, and API sought an order compelling arbitration under the Federal Arbitration Act. In addition, under cases holding that a non-Indian can challenge a tribe's assertion of jurisdiction over him, see *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), API sought a declaratory judgment that the Tribe and the tribal court have no jurisdiction over API. App., *infra*, 37a–38a, 43a.

In November 2005, the District Court stayed its proceedings while API and the Tribe litigated jurisdictional questions in tribal court. *API I*, 401 F. Supp. 2d at 963.

3. Two-and-a-half years later, the tribal trial court ruled that it had jurisdiction over API. App., *infra*, 64a.

The tribal court of appeals affirmed. Applying tribal law, it held that the Bear Council had replaced the Walker Council as the duly elected tribal council when it won the May 2003 special election it held. *Id.* at 81a–87a. For that reason alone, the court concluded that the Walker Council lacked authority to bind the Tribe to the June 2003 Agreement. *Ibid.*

The court held that the 2003 BIA determinations and the NIGC orders had no bearing on its resolution of the question whether the Walker Council had authority to operate casino and to commit the Tribe to the June 2003 Agreement. *Id.* at 77a–81a.

The tribal court of appeals identified two bases for applying tribal law to API in tribal court. First, the court held that it had "*presumptive* civil jurisdiction" over API because API allegedly committed torts on tribal trust land. *Id.* at 94a (emphasis in original). Assuming, in the alternative, that it presumptively lacks jurisdiction over nonmembers no matter where their conduct occurs, the court held that the Tribe's case fit within only one of the two *Montana* exceptions to the prohibition. The court specifically held that the first exception, which allows tribal law to be applied to certain consensual relationships between a nonmember and a tribe or its members, was not satisfied because the Tribe's tort claims all "are premised on *lack* of consent and turn on the Tribe's claim that there was no valid Contract." *Id.* at 91a (emphasis in original). The court then held, however, that this was "the rare case" that satisfied the second *Montana* exception, which allows tribal law to be applied to nonmember conduct that imperils a tribe, because API's alleged conduct "was a direct threat to every aspect of tribal integrity and to the right of the Tribe to 'make its own laws and be governed by them.'" *Id.* at 94a (quoting *Nevada* v. *Hicks*, 533 U.S. 353, 361 (2001)).

4. After the tribal court's decision on jurisdiction, the District Court lifted its stay, considered the parties' dispositive motions, and agreed with the tribal court that the second *Montana* exception gives the

Tribe and the tribal court jurisdiction over API. *Id.* at 52a–59a.

5. The Eighth Circuit Court of Appeals affirmed in part and vacated in part. At the outset, the Court accepted the tribal court's conclusion that, as a matter of tribal law, the Bear Council acceded to power upon winning the May 2003 special election. *Id.* at 4a.

The Eighth Circuit recognized that, when applying the *Montana* exceptions, a court must examine the specific conduct regulated by each claim in a tribal-court complaint. *Id.* at 15a. Yet that examination, the Court held, "should not simply consider the abstract elements of the tribal claim at issue, but must focus on the specific nonmember conduct alleged, taking a functional view of the regulatory effect of the claim on the nonmember." *Id.* at 17a. In light of the broader factual allegations in the Tribe's complaint, not just the alleged conduct specifically at issue in the Tribe's tort claims, *id.* at 18a–19a, the Court concluded that API's alleged conduct on October 1, 2003, (a) threatened the Tribe's health and welfare because it was "reasonably likely to result in violence on tribal lands," *id.* at 20a; (b) threatened the Tribe's political integrity and economic security because it attempted "to seize control of the tribal government and economy by force," *ibid.*; and (c) occurred on tribal land, where the Tribe has greater power, *id.* at 21a. In a footnote, the Court specifically attributed "[n]o jurisdictional significance" to the BIA and NIGC orders. *Id.* at 21a n.7.

The Eighth Circuit therefore affirmed the District Court's holding that the tribal court has jurisdiction over the Tribe's trespass and trade-secrets claims under the second *Montana* exception. *Id.* at 22a.

And the Eighth Circuit vacated the District Court's holding that the October 1, 2003, events also supported jurisdiction over the Tribe's conversion claim; that claim, the Court found, relates to conduct—the taking of funds—that preceded the alleged events of October 2003. *Id.* at 22a–25a. Although the tribal court specifically refused to exercise jurisdiction over the Tribe's conversion claim under the first *Montana* exception, the Eighth Circuit remanded for the District Court to decide whether that exception nevertheless applies. *Ibid.*

The Eighth Circuit also rejected API's argument that the June 2003 Agreement binds the Tribe to arbitrate its claims, even if the Bear Council became the duly elected tribal council under tribal law in May 2003, because the federal orders gave the Walker Council authority to operate and reopen the casino. The Court held that the NIGC's determination that the Walker Council (*not* the Bear Council) was the only entity that could legally operate the casino under federal and tribal law did not preclude the tribal court from reaching the opposite conclusion. According to the Eighth Circuit, the question of the Walker Council's authority is a "pure" question of tribal law that is "beyond the purview of the federal agencies and the federal courts." *Id.* at 29a. The Court further reasoned that the NIGC orders did not give the Walker Council authority to operate the casino and investigate the Bear Council's illegal operation of it because API allegedly used excessive force in October 2003 and because the NIGC relied upon the BIA to determine which council was federally recognized. *Id.* at 30a–31a.

## REASONS FOR GRANTING THE PETITION

### I. THE EIGHTH CIRCUIT'S DISREGARD OF THE BIA AND NIGC ORDERS CONFLICTS WITH ESTABLISHED PRECEDENT AND UNDERMINES THE FEDERAL REGULATORY REGIME.

At the heart of this case is the question of who gets to decide whether, in June 2003, the Walker Council had authority to operate the Tribe's federally regulated casino, cure the violations the NIGC found, and contract with third-parties to accomplish those goals. Even though, at that time, the BIA had recognized the Walker Council and the NIGC had closed the casino subject to the Walker Council regaining control of it, the Eighth Circuit held that the federal agencies' orders could not have decided the Walker Council's authority because that authority is purely a matter of tribal law that only tribal courts can decide.[2] Thus, the Eighth Circuit held that the

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[2] A federal court reviews *de novo* a tribal court's resolution of federal questions that bear on the tribal court's jurisdiction over a nonmember. See App., *infra*, 10a–14a; *AT&T Corp.* v. *Couer d'Alene Tribe*, 295 F.3d 899, 904 (CA9 2002); see also *Iowa Mutual Co.* v. *LaPlante*, 480 U.S. 9, 19 (1987) ("*Unless a federal court determines that the Tribal Court lacked jurisdiction*, however, proper deference to the tribal court system precludes relitigation of issues raised by the LaPlantes' bad-faith claim and resolved in the Tribal Courts.") (emphasis added). The Eighth Circuit questioned whether the authority of the Walker Council bears on the tribal court's adjudicative jurisdiction, which is why the Eighth Circuit suggested it should defer to the tribal court's disposition of the issue (though it conducted a *de novo* review anyway). App., *infra*, 10a–14a. The validity of the Agreement is principally a matter of tribal court's adjudicative jurisdiction: if valid, the tribal court must send the Tribe's claims to arbitration, *i.e.*, it must not adjudicate them.

(footnote continued on next page)

tribal court was free in 2008 to hold that the agencies erred five years earlier when they failed to recognize the Bear Council and closed the Tribe's casino because the Bear Council was operating it. On this important question of federal law, the Eighth Circuit's decision conflicts with decisions of this Court and other courts of appeals, deviates from basic principles of administrative law, and undermines federal Indian programs throughout the country.

### A. Federal agencies' determinations of tribal control can be challenged and overturned only in authorized appeals.

Not all questions of tribal law are completely "beyond the purview of the federal agencies." App., *infra*, 29a. In certain circumstances, the BIA and NIGC must decide questions of tribal governance and questions of control of federally regulated casinos. The BIA "occasionally is forced to identify which of two or more competing tribal political groups to recognize as the proper representative of the tribe." *Cohen's Handbook of Federal Indian Law* § 4.06[1][b], p. 290 (2005) (hereinafter "Cohen"). The Secretary of the Interior, acting through the BIA, has power to manage "*all* Indian affairs and *all* matters arising out of Indian relations," 25 U.S.C. § 2 (emphases added), and thus has power to decide whether a putative tribal council is, or is not, acting on behalf of a tribe. See *Calif. Valley Miwok Tribe* v. *United States*, 515 F.3d 1262, 1267–1268 (CADC 2008) (affirming the Secretary's decision to reject a

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Accordingly, federal questions relevant to the Walker Council's authority—such as the significance of the BIA and NIGC orders—are answered *de novo*.

constitution submitted by one tribal faction on the ground that it did not "reflect majoritarian values"); see also *Seminole Nation* v. *United States*, 316 U.S. 286, 296–297 (1942) (for the federal government knowingly to deal with "a tribal council which * * * was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation"). For its part, the NIGC has power to issue casino closure orders for violations of federal and tribal laws, which, include laws relating to operation of a casino by recognized entities. See 25 U.S.C. § 2713(b)(1). The Eighth Circuit thus had no basis for holding that "[t]here is no indication that Congress has granted the BIA or NIGC the authority API claims for them." App., *infra*, 33a.[3]

Both the BIA and NIGC exercised their authority in 2003. Attempting to identify the most representative tribal government, the BIA recognized the Walker Council over the Bear Council, concluding (wrongly, as the tribal court now says) that the May 2003 special election "was not called and held in ac-

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[3] Contrary to the Eighth Circuit's assertion, App., *infra*, 29a, API did not concede that the BIA and NIGC cannot interpret tribal law as necessary. See API's CA8 Opening Br. 31–36 (discussing agencies' power to identify a tribe's representative council); API's CA8 Reply Br. 13–14 ("Rightly or wrongly, all arms of the federal government recognized the Walker Council in June 2003, when API entered into the June 2003 Agreement. The time for challenging Walker's federal recognition has long since lapsed. The question remains whether, in June 2003, that federal recognition vested Walker with a limited federal authority to bind the Tribe in matters related to its federal affairs and federally regulated activities, including overseeing casino operations.").

cordance with tribal law." App., *infra*, 147a. And the NIGC closed the Tribe's casino until the unrecognized Bear Council gave up control of it and thereby rectified the substantial violations of federal and tribal law. *Id.* at 99a–103a.

That the agencies might have erred in their interpretation of the tribal laws at the root of their orders does not mean that the tribal court now can sit in review of those orders. Congress can require that challenges to federal administrative rulings be brought in particular forums at particular times. See *Yakus* v. *United States*, 321 U.S. 414, 434 (1944); *Lichter* v. *United States*, 334 U.S. 742, 792 (1948). Federal law specifically channels challenges to BIA decisions and NIGC orders. BIA decisions are reviewable by federal courts under the APA, 5 U.S.C. § 704, only after administrative appeals are exhausted, 25 CFR Part 2, 43 CFR Part 4. See *Stock West Corp.* v. *Lujan*, 982 F.2d 1389, 1391 (CA9 1993) ("Decisions made by BIA Area Directors are subject to administrative appeal."). NIGC closure orders are reviewable by federal courts, 25 U.S.C. § 2713(c), only after administrative appeals to the full Commission, *id.* §§ 2706(a)(5), 2713(b)(2). Tribal courts have no role in those processes, so they have no power to review or contradict the agencies' determinations, even when partially premised on tribal law. Cf. 25 U.S.C. § 2713(d) ("Nothing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction *if such regulation is not inconsistent with this chapter or with any rules or regulations adopted by the Commission*.") (emphasis added).

To hold that BIA and NIGC orders bind tribal courts unless properly reversed is not to disparage the federal policy favoring Indian autonomy and self-government. After recognizing a council during an intratribal leadership dispute, the BIA must recognize a new council (if it is truly representative) when the dispute ends. See *Goodface* v. *Grassrope*, 708 F.2d 335, 339 (CA8 1983); *Wheeler* v. *BIA*, 811 F.2d 549, 552–553 (CA10 1987). While the BIA and NIGC orders did not strip the Tribe of power to resolve its leadership dispute under tribal law and elect a new council to lead it *prospectively*, the Tribe had (and still has) no independent power to undo the federal orders *retroactively*.[4]

Here, neither the Tribe nor any faction appealed the BIA's recognition of the Walker Council. And when the Tribe administratively appealed the NIGC's temporary closure order, it specifically did not dispute the finding that only the Walker Council could operate the casino consistent with federal and tribal law. Both agencies changed their positions only after the Bear Council won the November 2003 special election. Accordingly, by virtue of the 2003 federal orders—particularly the express terms of the NIGC orders—the Walker Council was the only entity with authority to operate the Tribe's casino lawfully while the orders were in effect (between May and November 2003), even if the Bear Council was actually duly elected in May 2003.

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[4] The same logic defeats the Eighth Circuit's holding that API's alleged use of excessive force in October 2003, retroactively negated the Walker Council's authority to operate the casino and enter the June 2003 Agreement four months earlier.

### B. The Eighth Circuit's decision has broad negative consequences.

Because the Eighth Circuit has jurisdiction over a large percentage of the nation's Indian tribes and tribal courts, its holding that tribal law defines the authority of a federally recognized tribal council to bind a tribe to contracts within the council's federal sphere has a broad, harmful impact.[5] Under the holding, a tribe can repudiate any contract on the supposedly tribal-law ground that the negotiating council—despite its unchallenged federal recognition and despite federal orders affirming its exclusive authority in an area—was not actually duly elected under tribal law. Because the question is which law controls a federally recognized tribal council's authority within its federal sphere, there is nothing in the Eighth Circuit's reasoning that limits its holding to times when dissidents are openly challenging the federally recognized tribal council (as happened within the Tribe in 2003). If tribal law controls, a tribe could repudiate any contract at any time.

Federal recognition of tribal councils is the foundation for the federal government's provision of services to Indian tribes. As through the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*, tribes now administer many programs the government used to administer for them. Third-party nonmembers are an important part of the regime. See, *e.g.*, *Ramah Navajo Sch. Bd.* v. *Bureau of Rev. of NM*, 458 U.S. 832, 834–835,

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[5] The vast majority of Indian law cases arise in the Eighth, Ninth, and Tenth Circuits. See Fletcher, *Factbound and Splitless*, 51 Ariz. L. Rev. 933, 956 (2009) (examining certiorari petitions filed between 1986 and 1993).

839–843 (1982) (describing cooperative federal/tribal school-building program in which non-Indians contracted with a tribe through its federally recognized tribal organization). Without federal recognition, nonmembers will balk at participating in federal Indian programs and federally authorized Indian enterprises. The provision of services to Indians will be paralyzed, and the success of Indian-controlled enterprises will be endangered, contrary to express congressional policy. See, *e.g.*, 25 U.S.C. § 450a (policies of Indian Self-Determination and Education Assistance Act); 25 U.S.C. § 2702 (policies of Indian Gaming Regulatory Act).

## II. THE EIGHTH CIRCUIT APPLIED THE SECOND *MONTANA* EXCEPTION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS.

The basic framework for determining whether an Indian tribe has civil legislative jurisdiction to regulate a nonmember is straightforward.[6] A tribe presumptively has no power to regulate nonmembers, no matter where their activities occur, and can do so only in two highly limited circumstances, called the *Montana* exceptions. See *Plains Commerce*, 128 S. Ct. at 2720. Under the first exception, a tribe may regulate certain consensual relationships between a nonmember and the tribe or its members. *Ibid.* Under the second exception—as originally conceived—a tribe may regulate nonmember conduct that "threatens or has some direct effect on the political integ-

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[6] Nonmembers are totally exempt from tribal criminal law and prosecution in tribal court. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

rity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

This Court has since noted that the original formulation of the second *Montana* exception "can be misperceived" to allow tribes so much jurisdiction that "the exception would severely shrink the rule." *Strate* v. *A-1 Contractors*, 520 U.S. 438, 458 (1997). "Key to its proper application" is the preface to the description: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members * * *. But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." *Id.* at 459 (quoting *Montana*, 450 U.S. at 564) (internal quotation marks omitted) (alterations in original). See *Hicks*, 533 U.S. at 360–361 (quoting *Strate* and holding that "[t]ribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them."). Underscoring that narrowness, the Court has further held that the second *Montana* exception allows a tribe to regulate nonmembers only when their conduct threatens "the political integrity, the economic security, or the health or welfare of the tribe" with "*catastrophic consequences*." *Plains Commerce*, 128 S. Ct. at 2726–2727 (emphasis added).

In contrast with decisions involving tribal *legislative* jurisdiction, this Court's decisions have never upheld a tribal court's exercise of *adjudicative* jurisdiction over a nonmember. See *Hicks*, 533 U.S. at 374 (noting that the concurrence would have been the first). In fact, the Court has left open the ques-

tion of tribal-court jurisdiction over nonmember defendants in general. *Id.* at 358 & n.2; *id.* at 386 (Ginsburg, J., concurring). Rather than answer that question, the Court has held that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *Strate*, 520 U.S. at 453, and always has found the *Montana* exceptions not satisfied. See, most recently, *Plains Commerce*, 128 S. Ct. at 2726–2727. In other words, the Court has identified a potential necessary condition for tribal adjudicative jurisdiction over nonmembers, but never has identified what else may be necessary or what is sufficient.

## A. In several ways, the Eighth Circuit's decision conflicts with this Court's decisions about tribal jurisdiction over nonmembers.

### 1. By focusing on the context of the Tribe's claims, rather than the conduct they challenge, the Eighth Circuit expanded the reach of the *Montana* exceptions.

This Court has held that the nonmember conduct a court must consider in applying the *Montana* exceptions is that which is "tied specifically" to the tribal law brought to bear on a nonmember. *Plains Commerce*, 128 S. Ct. at 2725 & n. 2. Tribal adjudicative jurisdiction over a nonmember defendant is permissible only when a tribe's claims "challenge" or "turn[] on" nonmember conduct that implicates the *Montana* exceptions. *Id.* at 2720; see *ibid.* (characterizing discrimination claims as challenging the sale of land).

In this case, the Tribe's trespass and trade-secrets claims challenge and turn on entry into a casino and taking and reviewing tribal gaming information—not conduct that inherently threatens a

tribe with catastrophe. Through its tort claims, the Tribe seeks relatively small real and personal property damages, which, as the Ninth Circuit has held, confirms that the claims do not implicate significant tribal interests. See *Boxx* v. *Long Warrior*, 265 F.3d 771, 777 (CA9 2001) (responding to the argument that a tribal court could adjudicate a claim because it involved drunk driving: "The action in tribal court does not seek to enforce or control the distribution or consumption of alcohol on the reservation. Rather, it seeks damages for negligence.").

Departing from this Court's instruction to focus on nonmember conduct, the Eighth Circuit held that "the allegations relevant to our jurisdiction inquiry are not limited to those that track the elements of the Tribe's claims. The *context* is also significant * * *." App., *infra*, 18a (emphasis added). The Eighth Circuit reached the wrong conclusion about the second *Montana* exception in this case because it incorrectly considered the "context" of the Tribe's case—including API's supposed involvement in tribal politics, which the Tribe's complaint does not allege—even though the Tribe's trespass and trade-secrets claims do not turn on those circumstances. *Id.* at 18a–22a. Neither the broader context of a case nor the conduct of tribe members is *nonmember conduct* that a tribal-law tort claim could challenge.

This Court's precedents point toward a categorical approach in applying the *Montana* exceptions, under which tribal law may be applied to nonmember conduct only if it categorically targets conduct that, by its nature or in the ordinary case, would fit within a *Montana* exception. *Cf. Taylor* v. *United States*, 495 U.S. 575 (1990); *James* v. *United States*, 550 U.S. 192, 201–202 (2007). The Eighth Circuit

expressly rejected that approach. App., *infra*, 16a–18a. Yet "[a]s to nonmembers, * * * a tribe's adjudicative jurisdiction does not exceed it legislative jurisdiction." *Strate*, 520 U.S. at 453. If tribal law (written or unwritten) does not generally challenge or turn on nonmember conduct that fits into the second *Montana* exception, a tribal court cannot adjudicate any claim against a nonmember premised on that law, or else the tribe's adjudicative jurisdiction would exceed its legislative jurisdiction. A categorical approach to the *Montana* exceptions provides clear notice to both a tribe and nonmembers about which tribal laws, if any, govern nonmember conduct. Given the "limited nature of tribal sovereignty and the liberty interests of non-members," clear notice is vital. *Plains Commerce*, 128 S. Ct. at 2723; see *Hicks*, 533 U.S. at 383 (Souter, J., concurring) ("The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals,' which differ from traditional American courts in a number of significant respects.") (quoting *Duro* v. *Reina*, 495 U.S. 676, 693 (1990)). And a categorical approach is highly suited to application before alleged facts are proved to a factfinder, for it prevents tribal-court plaintiffs from generating tribal-court jurisdiction through artful pleading, only to have the trumped-up allegations disproved at trial.

2. The Eighth Circuit improperly disregarded federal laws and administrative decisions in applying the second *Montana* exception.

Federal statutes and administrative decisions delimit a tribe's sovereignty for purposes of applying the *Montana* exceptions. "[T]he existence and extent

of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, *as well as a detailed study of relevant statutes*, Executive Branch policy as embodied in treaties and elsewhere, *and administrative or judicial decisions*." *Nat'l Farmers Union*, 471 U.S. at 855–856 (emphases added). In holding that API's alleged conduct on October 1, 2003, sustains the tribal court's jurisdiction over the Tribe's tort claims, the Eighth Circuit departed from that admonition. Without more, the Eighth Circuit held that the BIA and NIGC orders were irrelevant to applying the second *Montana* exception. App., *infra*, 21a n.7.

Had the Eighth Circuit properly considered the federal orders and the broader regulatory context, it would have seen that API's alleged investigatory activities—done in accordance with the NIGC orders closing the Tribe's casino, at the instance of the federally recognized tribal council those orders charged with operating the casino—could not have threatened the Tribe's sovereignty with catastrophe. "There is no doubt that IGRA constitutes a substantial infringement on the sovereign rights of tribes to be the exclusive regulators of gaming within their reservations." Cohen, § 12.02[4], p. 864. The IGRA substantially diminishes Indian sovereignty over casinos by making their operation subservient to federal power and by requiring that tribes open their land and records to authorized individuals. See 25 U.S.C. § 2706(b) (NIGC's investigative powers include power to access tribal lands and records and to hire help); *id.* § 2716 (allowing NIGC to share information with "appropriate law enforcement officials"); see also Cohen, § 12.02[5], p. 865 (the power to close tribal casinos "has been held to belong exclusively to

the federal government"); *Solis* v. *Matheson*, 563 F.3d 425 (CA9 2009) ("[O]ur previous decisions * * * implicitly ruled that * * * that federal officers were authorized to enforce the gambling prohibition by entering reservation property.").

The NIGC orders in this case specifically defeat the Eighth Circuit's holding that API's alleged conduct threatened the Tribe's political integrity and economic security. App., *infra*, 20a–21a. Because the orders affirm that the Walker Council alone could operate the casino, any effort to investigate the Bear Council's illegal operation of the casino and to help the Walker Council regain control could not have threatened the Tribe with political catastrophe.[7] See *Hicks*, 533 U.S. at 364–365 (the enforcement of state and federal law does not so impair

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[7] Although the Tribe's complaint does not allege a political overthrow, the Eighth Circuit nonetheless characterized the conduct actually alleged—entering the casino with 30 individuals, assaulting the dissidents inside, and taking and reviewing information *about the gaming operation*—as a "coup d'état." App., *infra*, 20a n.6. In *Strate* and *Plains Commerce*, this Court refuted the Eighth Circuit's notion that, for purposes of the second *Montana* exception, "[c]onduct reasonably likely to result in violence on tribal lands sufficiently threatens tribal health and welfare to justify tribal regulation." App., *infra*, 20a. See *Strate*, 520 U.S. at 457–458 ("Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if Montana's second exception requires no more, the exception would severely shrink the rule."); *Plains Commerce*, 128 S. Ct. at 2726 (requiring "catastrophic" injury to core tribal interests). The only case the Eighth Circuit cited to support its logic is inapposite, since it was *decided 14 years before* Strate. App., *infra*, 20a (citing *Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587 (CA9 1983)).

tribal self-government that a tribal court may adjudicate claims of trespass and trespass to chattels). And because the NIGC orders had cut off the Tribe's revenue stream by closing the Tribe's casino until the Walker Council regained control, API's alleged entry into the casino and review of the casino's records could not have threatened the Tribe with economic catastrophe, either. All of the political and economic damage the Eighth Circuit ascribed to API's alleged conduct was damage the NIGC orders already did; by allegedly acting in accordance with those orders, API could not have done any more. Cf. *Plains Commerce*, 128 S. Ct. at 2723 (tribes cannot regulate sale of fee land because it "has already been alienated from the tribal trust").

3. The Eighth Circuit's reliance on land status is inconsistent with this Court's precedents.

After *Montana*, courts wrestled with whether the presumption against tribal jurisdiction over nonmembers was universal or whether it applied only to nonmember conduct on non-Indian fee land. Compare *McDonald* v. *Means*, 309 F.3d 530, 540 & n.9 (CA9 2002) (tribal ownership of land precludes application of *Montana*), with *id.* at 542 (Wallace, J., dissenting) ("The majority establishes a presumption in favor of tribal civil jurisdiction over nonmembers in cases involving tribal land."). The Court has since clarified that the presumption is universal. "[O]wnership status of land * * * is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" *Hicks*, 533 U.S. at 360; see *id.* at 388 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he majority is quite right that *Montana* should

govern our analysis of a tribe's civil jurisdiction over nonmembers both on and off tribal land.").

The Eighth Circuit held that the second *Montana* exception was satisfied because of the casino's location on tribal trust land—which is, after all, where the IGRA requires Indian casinos to be sited. See 25 U.S.C. § 2710 (regulating "gaming on Indian lands"). But it did not explain *why* that fact supported jurisdiction over any of the Tribe's claims—especially the trade-secrets claims, which have no connection with land. App., *infra*, 21a–22a. To *consider* ownership status of land requires more than merely *noting* who owns it. In *Strate*, for instance, the Court considered that the land in question was "open to the public" and that the tribe had "retained no gatekeeping right" over the land. 520 U.S. at 455–456. Here, as the IGRA and the NIGC orders make clear, on October 1, 2003, the Tribe had no gatekeeping rights vis-à-vis the NIGC, the federally recognized tribal council (*i.e.*, the Walker Council), and the council's authorized agents (*i.e.*, API). Moreover, when not temporarily closed by the NIGC, the Tribe's gaming enterprise is open to the public, a fact that the Oklahoma Supreme Court has concluded cuts against tribal jurisdiction over nonmembers at Indian casinos. See *Cossey* v. *Cherokee Nation Enters.*, 212 P.3d 447, 458 (Okla. 2009) ("Without the logic of *Plains*, which incorporates the general rule of *Montana* and its exceptions, Cossey and all other non-Indians would unknowingly subject themselves to tribal regulation and, thus, to tribal court jurisdiction without their consent merely by entering a casino in Indian Country.").

The Eighth Circuit's position that the second *Montana* exception was satisfied because "[t]he

Tribe's trespass and trade secret claims * * * seek to regulate API's entry and conduct upon tribal land," App., *infra*, 21a, effectively flips the presumption against tribal jurisdiction over nonmembers and revives the discarded notion that Indian tribes have plenary authority over nonmembers on Indian lands. At the very least, the Eighth Circuit's holding condones *per se* tribal jurisdiction over trespass claims, a result that, given the prevalence Indian casinos nationwide, would "swallow the rule" against tribal jurisdiction over nonmembers. *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 655 (2001).

4. The Eighth Circuit fully equated tribal legislative and adjudicative jurisdiction without any meaningful analysis.

In holding that the Tribe can regulate API under the second *Montana* exception, the Eighth Circuit equated tribal legislative and adjudicative jurisdiction over nonmembers and largely dodged the question, which *Hicks* expressly reserved, whether something more than legislative jurisdiction is needed before a tribal court has adjudicative jurisdiction over a nonmember. Citing *Strate*—which preceded *Hicks* and so could not have answered the question *Hicks* left open—the Eighth Circuit held that nothing more is needed and that a tribal court presumptively may exercise jurisdiction over a nonmember whenever a tribe possesses legislative jurisdiction over the nonmember conduct at issue in tribal-court claims. App., *infra*, 13a n.5. The Eighth Circuit's summary analysis is inconsistent with *Hicks*. "The question (which [this Court has] avoided) whether tribal regulatory and adjudicatory jurisdiction are coextensive" was "simply answered" by the Eighth Circuit "in the affirmative," but the question "surely deserves more

considered analysis." *Hicks*, 533 U.S. at 374. API should not be forced to defend itself in tribal court when neither this Court nor the Eighth Circuit has given the question of tribal-court jurisdiction over nonmembers the attention it deserves.

### B. The Eighth Circuit's decision conflicts with other courts of appeals' decisions about tribal jurisdiction over nonmembers.

By downplaying the federal orders and federal law, the Eighth Circuit rejected other courts' conclusions about tribal sovereignty over federally regulated casinos.

The D.C. Circuit holds that "operation of a casino is not a traditional attribute of self-government." However important a casino may be to a tribe, the business operation "is virtually identical to scores of purely commercial casinos across the country." *San Manuel Indian Bingo & Casino* v. *NLRB*, 475 F.3d 1306, 1315 (CADC 2007). Contrary to the Eighth Circuit's position, nonmember conduct that injures (or threatens to injure) an Indian casino is not conduct that threatens a unique aspect of tribal integrity that the second *Montana* exception protects. Tribal regulation of such conduct is not, as it must be for a tribe to regulate it, "connected to that right of the Indians to make their own laws and be governed by them." *Hicks*, 533 U.S. at 360–361.

The Ninth Circuit holds that a tribe's decision to give up sovereignty in one area undercuts subsequent efforts to invoke the second *Montana* exception to regulate nonmember conduct in that area. Giving up the right to exclude, for instance, "is a significant alienation of tribal sovereignty and control." "Having ceded that right," a tribe cannot assert ju-

risdiction over a nonmember "for activities arising directly out of the arrangement" because such activities cannot "be seen as threatening self-government or the political integrity, economic security or health and welfare of the tribe." *County of Lewis* v. *Allen*, 163 F.3d 509, 514–515 (CA9 1998) (en banc) (tribe had consented to have state exercise concurrent criminal jurisdiction). Before it could operate a casino under the IGRA, the Tribe gave up its right to exclude authorized persons from the casino and its rights to keep its gaming information from authorized persons. See, *supra*, pp. 25–26. The Eighth Circuit nonetheless allowed the Tribe to claim infringement of its ceded rights.

Since *Strate* refined the second *Montana* exception to stop it from being "misperceived," federal courts of appeals confronting a wide variety of claims and fact patterns have largely rejected tribal-court jurisdiction under the exception.[8] The Eighth Cir-

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[8] See, *e.g.*, *Town Pump, Inc.* v. *LaPlante*, 2010 WL 3469578 (CA9 Sept. 3, 2010) (toxic discharges); *Philip Morris USA* v. *King Mountain Tobacco*, 569 F.3d 932 (CA9 2009) (trademark dispute); *Nord* v. *Kelly*, 520 F.3d 848 (CA8 2008) (car accident); *MacArthur* v. *San Juan County*, 497 F.3d 1057 (CA10 2007) (employment dispute); *Boxx* v. *Long Warrior*, 265 F.3d 771 (CA9 2001) (drunk driving); *Burlington N. R.R. Co.* v. *Red Wolf*, 196 F.3d 1059 (CA9 2000) (train collision); *County of Lewis* v. *Allen*, 163 F.3d 509 (CA9 1998) (en banc) (state-officer arrest); *Hornell Brewing Co.* v. *Rosebud Sioux Tribal Court*, 133 F.3d 1087 (CA8 1998) (defamation, right of publicity, and intentional infliction of emotion distress); *Wilson* v. *Marchington*, 127 F.3d 805 (CA9 1997) (car accident); *Yellowstone County* v. *Pease*, 96 F.3d 1169 (CA9 1996) (state property taxes).

Courts that have permitted tribal courts to adjudicate claims against nonmembers have not relied upon the second *Montana* exception. See, *e.g.*, *Smith* v. *Salish Kootenai College*,

(footnote continued on next page)

cuit's holding that the tribal court has jurisdiction over API under the second *Montana* exception is truly unprecedented and thus deserves this Court's review.[9]

### C. The Eighth Circuit's errors are squarely presented.

This case is not interlocutory simply because the Eighth Circuit vacated the portion of the District Court judgment holding that the second *Montana* exception allows the tribal court to exercise jurisdiction over the Tribe's conversion claim. If API prevails on remand, it will be forced to litigate the trespass and trade-secrets claims in tribal court, and API will have no further opportunity to seek this Court's review. Moreover, the Eighth Circuit rejected API's arguments about the BIA and NIGC orders, which would have defeated tribal jurisdiction over *all* the Tribe's claims.

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434 F.3d 1127 (CA9 2006) (en banc) (affirming jurisdiction under first exception over nonmember who filed counterclaims in tribal court); *McDonald* v. *Means*, 309 F.3d 530 (CA9 2002) (affirming jurisdiction over a car accident without applying the *Montana* exceptions).

[9] As support, the Eighth Circuit cited *Elliott* v. *White Mountain Apache Tribal Court*, where, instead of deciding whether a tribe satisfied the *Montana* exceptions, the court held that the tribe had a "colorable" argument under the exceptions such that the nonmember had to litigate the jurisdictional questions in tribal court before seeking federal-court relief. See 566 F.3d 842, 848–850 (CA9 2009); see also *Hicks*, 533 U.S. at 369 (nonmembers must exhaust tribal-court remedies unless it is "plain" that tribal-court jurisdiction is lacking). *Elliott* thus does not anchor the Eighth Circuit's decision to subject API to trial in tribal court.

Additionally, the first *Montana* exception is not an alternative basis for sustaining the tribal court's jurisdiction, and the Eighth Circuit's notation that the Tribe's conversion claim might satisfy the first *Montana* exception disregards this Court's precedents. Though broadly defined as giving tribes regulatory power over nonmembers who "enter consensual relationships with the tribe or its members," *Montana*, 450 U.S. at 465, the first *Montana* exception, like the second, only permits tribal-court claims when they challenge or turn on those relationships. See *Plains Commerce*, 128 S. Ct. at 2720; see also *Atkinson*, 532 U.S. at 656 ("*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself."). The first exception focuses on contracts, not torts. See *Strate*, 520 U.S. at 457. The Tribe contends that it is a stranger to API's relationship with the Walker Council, which precludes applying the first *Montana* exception. See *ibid.* (a nonmember's contract with a tribe did not confer jurisdiction over tort claims because the injured plaintiff was not a party to the contract and the tribe was not involved in the accident). The tribal court correctly held that the Tribe's claims all "are premised on *lack* of consent and turn on the Tribe's claim that there was no valid Contract." App., *infra*, 91a (emphasis in original). Moreover, API has neither "expressly" nor by its "actions" consented to tribal-court jurisdiction. *Plains Commerce*, 128 S. Ct. at 2724. The June 2003 Agreement's arbitration and forum-selection clauses plainly manifest API's withholding of such consent. See *id.* at 2729 (Ginsburg, J., dissenting).

Finally, the Eighth Circuit's implicit holding that a federal court can affirm a tribal court's adjudica-

tive jurisdiction on a ground the tribal court explicitly rejected is without foundation. Only a nonmember defendant may challenge a tribal court's exercise of adjudicative jurisdiction because "federal courts have authority to determine * * * whether a tribal court has *exceeded* the limits of its jurisdiction." *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 483 (1999) (emphasis added) (citing *Nat'l Farmers Union*, 471 U.S. at 852–853). If a tribal court concludes that it lacks jurisdiction, it cannot have "exceeded the limits of its jurisdiction" and the tribal-court plaintiff has no cause of action to have a federal court force the unwilling tribal court to proceed. So too here. When a tribal court disclaims a ground for jurisdiction, federal courts cannot compel it to proceed on that ground. Thus, the Eighth Circuit's partial remand under the first *Montana* exception is yet another way in which its decision conflicts with precedent and expands tribal court jurisdiction over nonmembers.

## CONCLUSION

The Eighth Circuit's decision departs from basic principles of administrative law, greatly expands tribal jurisdiction over nonmembers (contrary to this Court's teachings), and destabilizes federal Indian programs that rely on nonmember participation. The Court should grant API's petition for certiorari to correct the Eighth Circuit's fundamental errors.

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